

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 22, 2008

DERRICK D. HUDSON v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Wilson County
No. 04-0090 John D. Wootten, Jr., Judge

No. M2008-00075-CCA-R3-PC - Filed November 19, 2008

Petitioner, Derrick D. Hudson, appeals the post-conviction court's summary dismissal of his petition for post-conviction relief as untimely filed. On appeal, Petitioner challenges the summary dismissal of his petition, arguing that Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531(2004) announced a new rule of law requiring retroactive application to his case. We affirm the post-conviction court's summary dismissal of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

Derrick D. Hudson, Nashville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Jerry D. Hunt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On August 4, 2004, Petitioner pled guilty to two counts of vehicular homicide by intoxication, a Class B felony, and, in exchange, the State entered a nolle prosequi to counts three through six of the indictment which charged Petitioner with four counts of reckless endangerment with a deadly weapon, a Class E felony. As part of the negotiated plea agreement, Petitioner agreed to be sentenced as a Range I, standard offender, to concurrent sentences of twelve years for each vehicular homicide conviction. The trial court accepted Petitioner's plea of guilty and imposed the agreed upon sentence of twelve years for each conviction.

Petitioner filed a petition for post-conviction relief on November 27, 2007, in which he argued that his sentences had been impermissibly enhanced by the trial court in violation of Blakely and State v. Gomez, 239 S.W.3d 733 (Tenn. 2007). Petitioner contended that Blakely and its

progeny announced a new rule of constitutional law requiring retrospective application. We acknowledge that Petitioner framed his issue on appeal as a violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1969) which concerns the State's requirement to disclose exculpatory evidence to a defendant, but his argument focuses only on the sentencing principles set forth in Blakely and its progeny.

The post-conviction court summarily dismissed the petition as time-barred, finding that Petitioner had failed to establish a claim for relief even if Blakely was applied retroactively. The trial court found that Petitioner voluntarily entered pleas of guilty to two counts of vehicular homicide by intoxication, that Petitioner agreed to two twelve year sentences as a Range One, standard offender, with the sentences to be served concurrently, and that the trial court, therefore, did not make any specific findings which would affect the length of Petitioner's sentences.

The Post-Conviction Procedure Act provides:

(a) Except as provided in subsections (b) and (c), a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred....

(b) No court shall have jurisdiction to consider a petition filed after such time unless:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial.

T.C.A. § 40-30-102(a), (b)(1).

In Blakely, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 301, 124 S.Ct. at 2536 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63 (2000)). The “statutory maximum” to which a trial court may sentence a defendant is not the maximum sentence after application of appropriate enhancement factors, other than the fact of a prior conviction, but the “maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Id. at 303, 124 S.Ct. at 2537. Under Blakely, then, the “statutory maximum” sentence which may be imposed is the presumptive sentence applicable to the

offense. See id., 124 S.Ct. at 2537. The presumptive sentence, therefore, may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant. See also Gomez, 239 S.W.2d at 740.

Nonetheless, this Court has previously held that Blakely does not apply retroactively to cases on collateral appeal. See Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, 2007 Tenn. Crim. App. LEXIS 962, at *17 (Tenn. Crim. App., Nashville, Nov. 13, 2007), perm. to appeal den. (Tenn. Apr. 7, 2008). In Meeks, we concluded that the weight of authority stemming from Cunningham and Apprendi, and their progeny are contrary to Petitioner's assertions in his brief. Additionally, this court has previously held that Blakely does not apply retroactively to cases on collateral appeal in the post-conviction setting. See Timothy R. Bowles v. State, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at *2-3 (Tenn. Crim. App., at Nashville, May 1, 2007), no perm. to appeal filed; Carl Johnson v. State, No. W2003-02760-CCA-R3-PC, 2005 WL 181699, at *11-12 (Tenn. Crim. App., at Jackson, Jan. 25, 2005), perm. to appeal den. (Tenn. June 27, 2005).

Because Petitioner failed to present a ground for relief which would toll the one-year statute of limitations applicable to the filing of a petition for post-conviction relief, we conclude that the post-conviction court did not err in summarily dismissing the petition as time-barred.

CONCLUSION

After review, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE